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No. 96-141

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARILYN R. HATCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was constitutionally entitled to have a jury at her trial on a charge that carried a maximum penalty of six months in jail and a $10,000 fine.

2. Whether the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. 248, violates the free speech clause of the First Amendment.

3. Whether Congress lacked authority under the Commerce Clause to enact the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. 248.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A32) is reported at 82 F.3d 1370. The district court's opinion (Pet. App. B1-B37) is reported at 863 F. Supp. 851.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on April 30, 1996. The petition for a writ of certiorari was filed on July 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory Background*

Congress enacted the Freedom of Access to Clinic Entrances Act of 1994 (Access Act), Pub. L. No. 103-259, 108 Stat. 694, 18 U.S.C. 248, in response to a nationwide campaign of violent and obstructive interference with access to reproductive health services. From 1977 through April 1993, more than 1,000 acts of violence against providers of abortion services were reported in the United States. S. Rep. No. 117, 103d Cong., 1st Sess. 3 (1993) (S. Rep.); H.R. Rep. No. 306, 103d Cong., 1st Sess. 6 (1993) (H.R. Rep.). Those acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, 71 chemical attacks, and one murder. S. Rep. 3, 6; H.R. Rep. 6-7; H.R. Conf. Rep. No. 488, 103d Cong., 2d Sess. 7 (1994) (H.R. Conf. Rep.). This violence endangered the lives of, and inflicted injuries on, physicians, clinic staff, and patients, caused millions of dollars of property damage, and curtailed access to health care for many women, particularly poor women who live in rural areas. S. Rep. 5.

Groups opposed to abortion organized blockades designed to bar access to health care facilities where abortions were performed and to overwhelm local law enforcement. S. Rep. 7; H.R. Rep. 7. From 1977 through April 1993, more than 6,000 clinic blockades and related disruptions were reported in the United States. S. Rep. 7; H.R. Rep. 7. Providers of abortions also received numerous death threats. S. Rep. 10.

Violence and blockades aimed at abortion providers and facilities have occurred in at least 28 States, the District of Columbia, and dozens of cities across the country. S. Rep. 12. Many of these activities have

been organized nationwide and directed across state lines. *Id.* at 13; H.R. Rep. 9. In addition, clinics and other providers of reproductive health services are involved in interstate commerce, both directly and indirectly. S. Rep. 31. Many patients who seek abortion services travel across state lines to obtain services, and clinic employees sometimes travel across state lines to work. *Ibid.*

The declared purpose and the effect of the violent and obstructive activities have been to inhibit women's access to safe and legal abortion services. S. Rep. 11 & n.22. In some cases, the purpose was to eliminate access by intimidating physicians from performing abortions and by closing clinics. *Id.* at 11, 17. The evidence before Congress demonstrated that the campaign to eliminate abortion services through violence and obstruction was succeeding and had forced many clinics to close. *Id.* at 14, 17, 31; H.R. Rep. 8-9.

Congress found that the violent and obstructive conduct burdens interstate commerce by

> interfering with the interstate commercial activities of health care providers, including the purchase and lease of facilities and equipment, sale of goods and services, employment of personnel and generation of income, and purchase of medicine, medical supplies, surgical instruments and other supplies from other states.

H.R. Conf. Rep. 7; see also S. Rep. 14, 17, 31-32. Congress also found that federal, state, and local laws in effect prior to the enactment of the Access Act were inadequate to prevent violence at abortion facilities. *Id.* at 19-21; H.R. Rep. 6, 10.

The Act provides for civil and criminal penalties for anyone who:

> (1) by force or threat of force or by physical obstruction,[1] intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; [or]
>
> * * * * *
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services * * *.

18 U.S.C. 248(a). The Act specifies, as one of its "Rules of Construction," that "[n]othing in this section shall be construed * * * to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. 248(d)(1).

2. *Factual Background*

a. In the early morning hours of June 4, 1994, petitioner and five co-defendants physically blockaded the two entrances to a reproductive health services clinic in Milwaukee, Wisconsin. Pet. App. A2, B4. Peti-

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[1] The Access Act defines "physical obstruction," in relevant part, as "rendering impassable ingress to or egress from a facility that provides reproductive health services * * * or rendering passage to or from such a facility * * * unreasonably difficult or hazardous." 18 U.S.C. 248(e)(4).

tioner, a co-defendant, and a juvenile sat in the recessed alcove of one of the clinic entrances, blocking the door with their bodies and with a fifty-five gallon drum filled with concrete and steel. *Id.* at A2-A3, B5. Two other defendants were attached by handcuffs, welding, and other means to a disabled automobile that had been placed on the sidewalk directly in front of the alcove, blocking access to the clinic. *Id.* at A2-A3, B5. Two other defendants were similarly fastened to a second automobile that blocked another entrance to the clinic. *Id.* at A3, B4-B5. Petitioner and her co-defendants refused to move away from the clinic entrances when ordered to do so by police. *Id.* at B5. Clinic staff members could not enter the clinic when they arrived at work that morning. *Ibid.* It took the fire department several hours to dismantle the cars, extricate petitioner and her co-defendants, and clear the entrances to the clinic. *Id.* at A3. During much of the period in which the fire department was working to clear the entrances, many patients with appointments to have abortions or consultations could not be served. *Id.* at A3, B6.

Petitioner and her co-defendants were charged by information with violation of the Access Act, 18 U.S.C. 248(a)(1), by using physical obstruction to intentionally interfere with and intimidate persons because those persons were obtaining or providing reproductive health services and in order to intimidate those person from obtaining or providing such services. Pet. App. B4, B6. Because they were charged with a first offense of only nonviolent physical obstruction, petitioner and each of her co-defendants faced a maximum penalty of six months' imprisonment and a fine of not more than $10,000. *Id.* at A3, B7 & n.4, B33-B34 & n.35; 18 U.S.C. 248(b).

Petitioner moved to dismiss the charges on various grounds, contending, *inter alia*, that the Access Act violated the First Amendment. Pet. App. B8. She also filed certain pretrial motions, as an alternative, including a request for a trial by jury. *Ibid.* The district court denied the motions. *Id.* at B8-B29, B33-B36. After a bench trial, the district court found petitioner guilty as charged. *Id.* at A3. The court sentenced petitioner to 30 days' incarceration, and ordered her to pay $500 as a fine and $158 in restitution. Pet. C.A. Br. App. A2-A5.

b. The court of appeals affirmed, Pet. App. A1-A16, emphasizing that the Access Act already has survived constitutional challenges in three other circuits similar to those raised by petitioner. *Id.* at A1, citing *United States* v. *Dinwiddie*, 76 F.3d 913 (8th Cir. 1996), petition for cert. pending, No. 96-5615; *Cheffer* v. *Reno*, 55 F.3d 1517 (11th Cir. 1995); *American Life League, Inc.* v. *Reno*, 47 F.3d 642 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995). In an opinion by Chief Judge Posner, the court held that Congress had authority under the Commerce Clause to enact the Access Act. Pet. App. A3-A4, A16. The court reaffirmed its decision in *United States* v. *Wilson*, 73 F.3d 675 (1995), cert. denied, Nos. 95-1523, 95-1883, 95-8995, 95-9041, 95-9081 (Oct. 7, 1996) (65 U.S.L.W. 3256), in which it had held that the Act is a valid exercise of congressional authority because the Act regulates activity that substantially affects interstate commerce. Citing the Senate Report that accompanied the legislation, the court below found that the Access Act "is a statute that really does seek to remove a significant obstruction, in rather a literal sense, to the free movement of persons and goods across state lines." Pet. App. A3-A4.

The court of appeals also rejected petitioner's claim that the Access Act violates the First Amendment. Pet. App. A5-A11, A16. The court concluded that obstruction of a clinic's entrances is conduct that goes beyond protest, invades property rights, and is not protected by the First Amendment. *Id.* at A7. The court also held that the Act does not impermissibly single out abortion clinics for special protection, does not have the purpose or effect of suppressing a particular viewpoint, and is not impermissibly vague. *Id.* at A5, A8-A11.

Finally, the court of appeals held that petitioner did not have a constitutional right to a jury trial on the charge against her. Pet. App. A11-A16. The court explained that the constitutional right to a trial by jury applies only to offenses that are deemed "serious" offenses, as opposed to "petty" offenses. The court held that, because the maximum prison term that petitioner could have received for the offense charged was six months, the offense was presumptively a petty offense that does not give rise to a constitutional right to a trial by jury. *Id.* at A12-A13, A16. The court of appeals emphasized that this Court "has made clear in a brace of recent unanimous opinions that where the maximum prison term is six months there is almost never going to be a constitutional right to trial by jury even if fines or other supplementary sanctions increase the net severity of punishment well beyond that of the prison term standing by itself." *Id.* at A12-A14, discussing *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 543 (1989), and *United States* v. *Nachtigal*, 507 U.S. 1, 3 (1993) (per curiam). The court concluded that the potential $10,000 fine in this case did not serve to overcome the presumption that the violation was a petty offense

because such a fine was not so onerous "as to make *clear* that Congress considered a first-time blockade of an abortion clinic a serious offense." *Id.* at A13. The court also specifically rejected the argument that petitioner had a right to a jury trial because the potential $10,000 fine she faced exceeded the amount included by Congress in its definition of the term "petty offense." Congress defines that term to include, *inter alia*, certain misdemeanors if the term of imprisonment does not exceed six months and the maximum fine for an individual does not exceed $5,000. *Id.* at A14.[2] The court held that the statutory definition "does not determine whether an offense is petty in the constitutional sense." *Ibid.*, citing *Muniz* v. *Hoffman*, 422 U.S. 454, 477 (1975). The court concluded that petitioner and her co-defendants were

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[2] Section 19 of Title 18 provides, in relevant part:

> As used in this title, the term "petty offense" means a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum fine is no greater than the amount set forth for such an offense in section 3571(b)(6) or (7) in the case of an individual or section 3571(c)(6) or (7) in the case of an organization.

18 U.S.C. 19.

Section 3571(b) provides, in relevant part, that:

> [A]n individual who has been found guilty of an offense may be fined not more than the greatest of—
>
> (1) the amount specified in the law setting forth the offense;
>
> * * * * *
>
> (6) for a Class B or C misdemeanor that does not result in death, not more than $5,000; or
>
> (7) for an infraction, not more than $5,000.

18 U.S.C. 2571(b).

"not entitled to have a jury consider the charges against them, because their offense was 'petty' in the sense that the Supreme Court has given the word and was therefore beyond the scope of the constitutional guaranty of trial by jury for federal crimes." Pet. App. A16.

Judge Kanne dissented in part, concluding that the $10,000 fine demonstrated that the offense was "serious" and thus subject to the constitutional right to a trial by jury. Pet. App. A16-A32.

ARGUMENT

1. a. Petitioner contends (Pet. 8-12) that she had a constitutional right to be tried by a jury on the charge against her. The court of appeals correctly held, however, that petitioner had no such right because the offense for which she stood trial constitutes a petty offense for constitutional purposes.

The constitutional guarantee of a jury trial in criminal cases applies only to "serious" offenses, and not to "petty" offenses. *Lewis* v. *United States*, 116 S. Ct. 2163, 2166 (1996); *Callan* v. *Wilson*, 127 U.S. 540, 541 (1888). Whether a particular offense is "serious" or "petty" depends on "objective indications of the seriousness with which society regards the offense." *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 543 (1989). The Court has held that the "best indicator of society's views is the maximum penalty set by the legislature." *United States* v. *Nachtigal*, 507 U.S. 1, 3 (1993) (per curiam).

An offense for which the legislature has authorized a maximum prison term of no more than six months is presumed to be a petty offense. *Nachtigal*, 507 U.S. at 3; *Blanton*, 489 U.S. at 543. To overcome that presumption, a defendant must demonstrate "that any

additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Ibid.* Additional penalties overcome the presumption of a petty offense only in "rare" cases. *Nachtigal*, 507 U.S. at 4. Moreover, fines will seldom be onerous enough to overcome the presumption because "they cannot approximate in severity the loss of liberty that a prison term entails." *Blanton*, 489 U.S. at 542.

Petitioner concedes (Pet. 8-9) that the offense for which she stood trial is presumed to be a petty offense because the maximum term of imprisonment authorized for such a first-time violation of Section 248(a)(1) by nonviolent obstruction is six months. The court of appeals correctly held that petitioner failed to overcome that presumption. The structure and history of the Access Act's penalty provisions do not reflect the necessary legislative determination that the violation with which petitioner was charged constitutes a serious, as opposed to a petty, offense. *Ibid.* To the contrary, they reflect a determination that a first violation committed by nonviolent physical obstruction is a substantially less significant offense than all other violations of the Act, including other misdemeanors that carry longer sentences.

In establishing the criminal penalties authorized for violations of the Access Act, Congress provided that, generally, for a first offense, the maximum term of imprisonment authorized is one year. 18 U.S.C. 248(b)(1), 3559(a)(6). The maximum term of imprisonment generally authorized for a second or subsequent violation of the Act is three years. 18 U.S.C. 248(b)(2). In both instances, the defendant also may

"be fined in accordance with [Title 18]," which authorizes a fine up to $100,000 in the first instance, and up to $250,000 in the case of felonies. See 18 U.S.C. 248(b)(1) and (b)(2); 3559(a)(5) and (a)(6); 3571(b)(3) and (b)(5).

Congress created two exceptions to the Access Act's generally applicable penalties, however. The two exceptions address the offenses that fall at the two extremes of the spectrum when Section 248(a) violations are ranked according to the violence involved. One exception applies to offenses at the most violent extreme—cases in which bodily injury or death results. That exception authorizes a term of imprisonment of up to 10 years in the former instance, and a term of imprisonment "for any term of years or for life" in the latter. 18 U.S.C. 248(b).

The other exception applies to offenses at the least violent extreme—cases such as petitioner's that "involv[e] exclusively a nonviolent physical obstruction." 18 U.S.C. 248(b). The exception authorizes a sentence of imprisonment of "not more than six months" and/or a fine of not more than $10,000, for a first offense, and a sentence of imprisonment of up to 18 months and/or a fine of not more than $25,000, for a subsequent offense. 18 U.S.C. 248(b). The penalty structure thereby sets nonviolent first offenses such as petitioner's apart from all other violations, including other misdemeanors. Whereas first offenses that are committed by nonviolent physical obstruction carry a maximum term of imprisonment of six months, all other misdemeanors under the Act can result in a maximum prison term of up to one year. These distinctions undermine any contention that there was a congressional determination that a first offense committed by nonviolent physical obstruction

constitutes a "serious" offense, as a constitutional matter, within the meaning of this Court's precedents.

The legislative history of the Access Act confirms that Congress did not intend that a first-time, nonviolent obstruction of a clinic entrance in violation of Section 248(a) constitute a serious criminal offense. In earlier versions of the bill that ultimately became the Access Act, the penalty provisions authorized the same punishment for offenses involving nonviolent physical obstruction as for offenses involving force or threat of force (unless the offense resulted in bodily injury or death). See 139 Cong. Rec. S15,655-S15,658 (daily ed. Nov. 16, 1993). Congress specifically amended the legislation, however, to dramatically lower the punishment for nonviolent violations. See *Id.* at S15,665-S15,676. The amendment reduced the maximum prison term for a nonviolent violation by half and cut the maximum fine by 90% to differentiate a violation committed by nonviolent physical obstruction as a substantially less significant offense than a serious violation that involved violent, threatening, or destructive conduct. 140 Cong. Rec. S5596 (daily ed. May 12, 1994). In reducing the punishment for nonviolent physical obstruction, Congress also maintained its distinction of first violations as less serious offenses than second or subsequent violations. Congress established that a first violation by nonviolent obstruction is the least serious violation—a misdemeanor that carries a maximum imprisonment term of six months; a second or subsequent violation by nonviolent obstruction is a felony that carries a maximum imprisonment term of 18 months. See *id.* at S15,675; 18 U.S.C. 248(b).

b. The court of appeals correctly rejected petitioner's argument (Pet. 9, 11) that, because the possible statutory fine exceeded the amount classified in 18 U.S.C. 19 as a petty offense, petitioner's violation must be considered a serious offense for constitutional purposes. Reliance on the statutory definition to define "petty offense" for constitutional purposes would be inconsistent with the Court's admonition that the presumption that an offense is a petty offense can be overcome only in "rare" cases, *Nachtigal*, 507 U.S. at 5; there would be no need to adopt such a heavy presumption if the statutory definition of "petty offense" were controlling.

Petitioner's argument is contrary to the Court's opinion in *Muniz* v. *Hoffman*, 422 U.S. 454 (1975). Emphasizing that the statutory definition of "petty offense" has no "talismanic significance," the Court in *Muniz* rejected the argument that a defendant has a right to a jury trial whenever a fine exceeds the dollar limit prescribed by the statutory definition. *Id.* at 477. Moreover, as the court of appeals noted, the fine imposed on the defendant union in *Muniz*, which was "held not to entitle the defendant to a jury trial, exceeded the then maximum fine for a Title 18 'petty offense' by a factor of twenty—$10,000, as here, but worth a lot more than twenty years ago, versus $500." Pet. App. A14.

The Court subsequently reaffirmed the *Muniz* ruling that the authorized term of imprisonment, rather than the authorized fine or other punishment, "is the most powerful indication of whether an offense is 'serious.'" *Blanton*, 489 U.S. at 542. Although the Court stopped short of holding that an offense carrying a maximum term of six months' imprisonment must always be considered a petty offense, the

Court went so far as to find it "appropriate to presume for purposes of the Sixth Amendment that society views such an offense as 'petty.'" *Id.* at 543. The Court emphasized that, under this approach, a jury trial will be available only "in the rare situation where a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless 'do not puncture the 6-month incarceration line.'" *Ibid.* Finally, in *Nachtigal*, the Court made clear that the *Blanton* presumption, that a maximum term of imprisonment of six months signifies a petty offense, could not be overcome even by a possible five-year term of probation spent in a community correctional facility, and/or a $5,000 fine. *Nachtigal* similarly discounted such punishments as unable to "approximate in severity the loss of liberty that a prison term entails." 507 U.S. at 4, quoting *Blanton*, 489 U.S. at 542. As the court of appeals put it, "[s]o confident was the Court that the punishment authorized by the statute involved in *Nachtigal* did not cross the line from petty to serious that it reversed the court of appeals unanimously on the certiorari papers, without calling for briefs or hearing oral argument." Pet. App. A14.

c. Petitioner contends (Pet. 9-11) that the court of appeals' ruling conflicts with decisions of other circuits that have relied on the statutory definition of "petty offense" to determine whether a defendant has a constitutional right to a jury trial. The alleged conflict does not warrant review by this Court.

In several of the cases cited by petitioner, the courts did not expressly hold that the statutory definition controls the jury trial issue. For example, in *Girard* v. *Goins*, 575 F.2d 160 (1978), the Eighth Circuit held that individuals who had received

contempt fines ranging from $2,500 to $10,000 were entitled to a jury trial, but the court refused to hold that a jury trial was required whenever a fine exceeded the limit set forth in the statutory definition of "petty offense." *Id.* at 165. In *United States* v. *PATCO*, 678 F.2d 1, 5 (1982), the First Circuit held that a $5,000 contempt fine was "serious" and triggered the right to a jury trial, but it did not cite the statutory definition of "petty offense" in reaching that result. In *United States* v. *Troxler Hosiery Co.*, 681 F.2d 934 (4th Cir. 1982), the court merely noted that other circuits had relied on the statutory definition of "petty offense" to determine whether fines imposed on individuals triggered the right to a jury trial. *Id.* at 936-937 & n.2. Moreover, all but one of the cases cited by petitioner were decided prior to the Court's adoption, in *Blanton*, of the presumption that a maximum six-month imprisonment term signifies a petty offense.[3] There is no basis for believing that the courts would necessarily find the statutory definition of "petty offense" dispositive if they were to revisit the issue in light of *Blanton* and *Nachtigal*. Review by this Court of the issue therefore would be premature at the present time.

In the one case cited by petitioner that was decided after *Blanton*, the court of appeals did not decide or discuss whether a fine exceeding the limit in the statutory definition of "petty offense" would auto-

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[3] See *Douglass* v. *First National Realty Corp.*, 543 F.2d 894, 902 (D.C. Cir. 1976) (holding that $500 figure in the now-repealed definition in 18 U.S.C. 1(3) was the dividing line between petty and serious offenses for individuals); *United States* v. *McAlister*, 630 F.2d 772, 774 (10th Cir. 1980) (same); *United States* v. *Hamdan*, 552 F.2d 276, 278, 280 (9th Cir. 1977) (same).

matically trigger the constitutional right to a jury trial. See *United States* v. *Time*, 21 F.3d 635 (5th Cir. 1994). In that case, the defendants argued that they had a right to a jury trial, even though their contempt fines did not exceed $5,000, and the court of appeals rejected that argument, noting that 18 U.S.C. 19 defines "petty offense" to encompass violations punishable by fines up to $5,000. 21 F.3d at 642. Moreover, an *en banc* opinion of that circuit suggests that, when faced with a case similar to petitioner's, the court would properly focus primarily on the term of incarceration—not the level of a fine—to distinguish petty and serious offenses; in *Landry* v. *Hoepfner*, 840 F.2d 1201, 1216 n.30 (1988) (*en banc*), cert. denied, 489 U.S. 1083 (1989), the court strongly suggested that a fine exceeding the limit in the statutory definition of "petty offense" would not trigger the constitutional right to a jury trial.

2. Petitioner contends (Pet. 12-17) that the Access Act is a content-based and viewpoint-based restriction on speech that violates the First Amendment. Petitioner's arguments are substantially similar to those raised by petitioners in *American Life League, Inc.* v. *Reno*, 47 F.3d 642, 648 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995), and in *Woodall* v. *Reno*, 47 F.3d 656, 657 (4th Cir.), cert. denied, 115 S. Ct. 2755 (1995). The Court should deny review in the present case for the same reasons it denied review in those cases. The court of appeals' holding is correct and does not conflict with the decisions of this Court or any other court of appeals.[4]

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[4] Two other courts of appeals have rejected similar First Amendment challenges to the Access Act. See *United States* v. *Dinwiddie*, 76 F.3d 913, 921-924 (8th Cir. 1996), petition for

a. The Access Act regulates conduct, not speech. The Act does not prohibit speech—even speech that strongly opposes abortion—in the immediate vicinity of facilities that provide abortion. Instead, it prohibits the use of "force," the "threat of force," and "physical obstruction" to achieve certain ends. As this Court has made clear, such conduct is outside the scope of First Amendment protections. See *Wisconsin* v. *Mitchell*, 508 U.S. 476, 484 (1993) (violence and physical assaults not protected by First Amendment); *Madsen* v. *Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2529 (1994) (threats not protected by First Amendment); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992) (same); *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965) (First Amendment does not create right to cordon off streets or entrances to building); *Cameron* v. *Johnson*, 390 U.S. 611 (1968) (upholding statute forbidding unreasonable interference with access to buildings). Congress may proscribe such activities, even when they are designed to communicate a message, because they "produce special harms distinct from their communicative impact." *Mitchell*, 508 U.S. at 484-485.[5]

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cert. pending, No. 96-5615; *Cheffer* v. *Reno*, 55 F.3d 1517, 1521 (11th Cir. 1995).

[5] Petitioner contends (Pet. 7, 12-13) that the Access Act should be scrutinized as a regulation of expressive conduct according to the approach followed by the Court in *Cox* v. *Louisiana*, 379 U.S. 536 (1965). In *Cox*, the Court reversed a conviction for violation of a state law prohibiting obstruction of public passages. The Court did so because the statute gave officials unbridled discretion to allow obstructive demonstrations with which they agreed, and to forbid those they opposed. *Id.* at 555-558. No such problem exists under the Access Act, which forbids all physical obstruction of clinics that is designed

Petitioner concedes (Pet. 12) that physical obstruction and use of force are unprotected by the First Amendment. She nonetheless contends that the Access Act violates the First Amendment because, in petitioner's view (Pet. 12-17), it singles out for punishment only conduct that expresses certain messages against abortion. Contrary to petitioner's assertion, the Access Act is content-neutral and viewpoint-neutral because it "serves purposes unrelated to the content of expression." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). The Act is justified, not by reference to the content of any expression it may incidentally affect, but by the needs to protect interstate commercial transactions, to protect women who seek to exercise their constitutional right to reproductive choice, and to maintain public safety and order. Pub. L. No. 103-259, § 2 (Purposes). Those interests are unrelated to any expressive content the forbidden conduct may have. Nor does the Access Act proscribe conduct with reference to its expressive conduct, if any. The Act permits the expression of any message, including a message of hostility to abortion.

Petitioner argues (Pet. 14-16), however, that the Access Act is a content-based regulation because it proscribes certain activity only when the defendant directs such conduct at another person "because" he or she is seeking to obtain or provide reproductive health services. 18 U.S.C. 248(a)(1). This requirement concerns the motive of a violator, not the

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to interfere with persons because they are providing or obtaining reproductive health services—regardless of whether the public authorities agree or disagree with the views of those causing the obstruction.

message the person wishes to convey. The First Amendment does not prevent a civil or criminal statutory provision from turning on such a motive. *Mitchell*, 508 U.S. at 487-488. And, contrary to petitioner's contention (Pet. 14-15), the Access Act is consistent with *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992). "[W]hereas the ordinance struck down in *R.A.V.* was explicitly directed at expression * * *, the statute in this case is aimed at conduct unprotected by the First Amendment." *Mitchell*, 508 U.S. at 487.

The Access Act does not target persons because they have an anti-abortion viewpoint. The Act does not limit its protection to "abortion clinics"; rather, it prohibits interference with persons because they are providing or obtaining "services relating to pregnancy," including counselling that an anti-abortion group might give to a pregnant woman to urge her *not* to have an abortion, and medical care to assist women in carrying their pregnancies to term. 18 U.S.C. 248(e)(5). The Act targets intentional interference with any reproductive health service, regardless of whether the perpetrator's views are anti-abortion or pro-choice. The use of force or physical obstruction to blockade a facility providing such services violates the Act to the same extent as a blockade of a facility offering abortion services.[6] For example, a person who supports the right to abortion might have purely personal reasons for desiring to stop a particular woman from having a particular

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[6] See Pet. App. B18 n.19. Indeed, in *United States* v. *Mathison*, No. 95-CR-85 (E.D. Wash. 1995), the government charged the defendant with violating the Access Act by threatening to injure persons who provide anti-abortion counseling.

abortion; the use of force or obstruction to achieve this end would violate the Act. –

b. Even if the conduct regulated by the Access Act had sufficient expressive content to implicate the First Amendment, it would easily withstand scrutiny under the test set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). The Act (1) serves substantial governmental interests, (2) restricts conduct for reasons unrelated to its expressive content, and (3) does not impinge unnecessarily on expression. See *id.* at 377.

The Act serves substantial and legitimate governmental interests: protecting interstate commercial transactions, preventing violence, preserving public access to health care, and protecting the exercise of the right to abortion. And, as we have explained above, those interests are unrelated to any expressive content the forbidden conduct may have.

The fact that, in practice, the majority of persons who wish to engage in conduct that would violate the Access Act may be persons who desire to express a message of hostility to abortion does not undermine the constitutionality of the Act. As *O'Brien* established, if a statute neutrally proscribes conduct, the fact that people who follow a particular ideology are more likely than others to engage in that conduct, or that such people wish to use illegal activity to express a message, does not affect the validity of the prohibition. The law at issue in *O'Brien* forbade the destruction of draft cards—conduct that, at the time the law was passed, was generally engaged in only by persons intending to express a message of hostility to the Vietnam war. The law was nonetheless held constitutional because it proscribed conduct without regard to any intended or unintended message. The

Access Act similarly proscribes obstructive, threatening, or violent conduct, without regard to the viewpoint of the violator or content of the message he or she may want to send.

The Access Act is narrowly tailored so as not to impinge unnecessarily on expression. It is carefully drawn to prohibit only unprotected conduct, not speech. Its limiting definitions of key statutory terms further ensure that it proscribes only force, threats, and blockades that interfere with access to reproductive health care.[7] The Act does not restrict the ability of abortion opponents to communicate with their desired audience. The statute permits speech, signs, prayers, non-obstructive picketing, distribution of handbills, and other peaceful forms of expression, even in the immediate vicinity of covered facilities and regardless of the content of the speech. *American Life League, Inc.* v. *Reno*, 47 F.3d 642, 648 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995).

This Court's decision in *Madsen*, *supra*, supports the Act's constitutionality. In *Madsen*, a state court enjoined certain anti-abortion activists who had engaged in specific protests outside a women's health clinic from, *inter alia*, engaging in essentially the same conduct that is forbidden by the Access Act: (1) interfering with access to, ingress into, and egress

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[7] The Act defines "interfere with" to mean "to restrict a person's freedom of movement." 18 U.S.C. 248(e)(2). "Intimidate" means "to place a person in reasonable apprehension of bodily harm to him- or herself or to another." 18 U.S.C. 248(e)(3). "Physical obstruction" means "rendering impassable ingress to or egress from a facility that provides reproductive health services * * *, or rendering passage to or from such a facility * * * unreasonably difficult or hazardous." 18 U.S.C. 248(e)(4).

from a women's health clinic; and (2) physically abusing, intimidating, harassing, touching, or assaulting persons entering or leaving the clinic, and harassing, intimidating or threatening any employee of the clinic. See 114 S. Ct. at 2522. The Court upheld these aspects of the injunction, concluding that these restrictions were content-neutral, that they were unrelated to the defendants' message, and that any effect on expression was incidental to the government's regulation of threatening conduct. *Id.* at 2524.

Finally, petitioner suggests (Pet. 17) that she was punished merely because of the anti-abortion message on a sign she was holding. But, the evidence (a videotape, Pet. App. A15) shows that she physically blocked the clinic entrance with her body and refused to move when the police ordered her to do so. Such conduct is not protected by the First Amendment, and the Access Act was constitutionally applied in this case.

3. Petitioner contends (Pet. 17-20) that Congress lacked authority under the Commerce Clause to enact the Access Act. She argues that the Act is invalid under *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), because the activity it prohibits does not substantially affect interstate commerce. Her contention is substantially similar to arguments raised by petitioners in *American Life League, Inc.* v. *Reno*, 47 F.3d 642 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995), and in *United States* v. *Wilson*, 73 F.3d 675 (7th Cir. 1995), cert. denied, Nos. 95-1523, 95-1883, 95-8995, 95-9041, 95-9081 (Oct. 7, 1996) (65 U.S.L.W. 3256). The Court should deny review in the present case for the same reasons it denied review in those cases. The

court of appeals' decision is correct and does not warrant further review by this Court.[8]

The Court in *Lopez* reaffirmed Congress's power under the Commerce Clause to regulate three broad categories of conduct. 115 S. Ct. at 1629-1630. First, Congress is empowered to regulate the use of the channels of interstate commerce. *Id.* at 1629. Second, Congress is empowered to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Ibid.* Third, Congress is empowered to regulate or prohibit "activities that substantially affect interstate commerce." *Id.* at 1629-1630.

The court of appeals correctly held that the Act is a valid exercise of Congress's power to regulate "ac-

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[8] Two other courts of appeals have held that the Access Act is a valid exercise of Congress's Commerce Clause powers. See *Dinwiddie*, 76 F.3d at 919-921; *Cheffer*, 55 F.3d at 1519-1521.

District courts in the Second, Fifth, Ninth and Tenth Circuits have reached the same conclusion. See *United States* v. *Scott*, 919 F. Supp. 76 (D. Conn. 1996); *United States* v. *Bird*, Crim. No. H-95-071 (S.D. Tex. June 6, 1995), appeal pending, No. 95-20792 (5th Cir.); *Cook* v. *Reno*, 859 F. Supp. 1008, 1011 & n.2 (W.D. La. 1994); *United States* v. *White*, 893 F. Supp. 1423 (C.D. Cal. 1995); *Riely* v. *Reno*, 860 F. Supp. 693, 707-708 (D. Ariz. 1994); *Council for Life Coalition* v. *Reno*, 856 F. Supp. 1422, 1430-1431 (S.D. Cal. 1994); *United States* v. *Lucero*, 895 F. Supp. 1421, 1423-1424 (D. Kan. 1995).

We are aware of only one, as-yet unreviewed, district court that has held that Congress lacked authority under the Commerce Clause to enact the Access Act. See *Hoffman* v. *Hunt*, 923 F. Supp. 791 (W.D.N.C. 1996), appeal pending, Nos. 96-1581, 96-1582, 96-1623 (4th Cir.). That district court decision conflicts with binding precedent of its own circuit, see *American Life League*, *supra*, and does not create a conflict calling for this Court's review.

tivities that substantially affect interstate commerce." *Lopez*, 115 S. Ct. at 1630.[9] Congress is empowered to regulate conduct that "substantially affects" interstate commerce when considered in the aggregate. *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942). "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (emphasis omitted) (upholding federal law criminalizing loan sharking without regard to whether particular loan transaction affected interstate commerce); see also *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 329-330 (1991) (boycott against one opthamologist affects interstate commerce).

Congress had a rational basis for concluding that the violent and obstructive activities prohibited by the Access Act "substantially affect interstate commerce" by their adverse impact on clinics and other providers of reproductive health services who are involved in interstate commerce:

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[9] The Access Act also constitutes a proper exercise of Congress's power, under the Commerce Clause, to regulate or protect "persons or things in interstate commerce," *Lopez*, 115 S. Ct. at 1629, as the court of appeals suggested. Pet. App. A4 (finding that the Access Act was designed to promote "the free movement of persons and goods across state lines"). Many patients who seek reproductive health services travel from one State to another to obtain services, clinic doctors and employees often travel across state lines to work, and clinics often acquire supplies from other States. See S. Rep. 31 The United States also maintains that the Access Act is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment. Because the court of appeals did not reach that question, however, it is not before the Court.

> Clinics and other abortion service providers clearly are involved in interstate commerce, both directly and indirectly. They purchase medicine, medical supplies, surgical instruments and other necessary medical products, often from other States; they employ staff; they own and lease office space; they generate income. In short, the Committee finds that they operate within the stream of interstate commerce.

S. Rep. 31. Also, many patients who seek abortion services "engage in interstate commerce by traveling from one state to obtain services in another," "[c]linic employees sometimes travel across State lines to work as well," and "some doctors who perform abortions work in facilities in more than one State." *Ibid.*

The violent and obstructive conduct proscribed by the Access Act substantially interferes with such interstate commerce. Such conduct disrupts the sale of services and goods, the employment of personnel and generation of income, the purchase and lease of facilities and equipment, and the purchase of medicine and supplies from other States. H.R. Conf. Rep. 7; S. Rep. 14, 17, 31; H.R. Rep. 8-9. Activity prohibited by the Act forced some clinics to close, caused millions of dollars in damages to others, impeded the interstate movement of people and goods, contributed to a nationwide shortage of reproductive health services, and threatened to eradicate those commercial services from the national market. S. Rep. 3, 5, 17, 31; H.R. Rep. 8. Extensive evidence that interference with abortion services is a problem of national scope further buttresses Congress's conclusion that the proscribed conduct has a substantial aggregate effect on interstate commerce. See, *e.g.*, *Katzenbach* v.

McClung, 379 U.S. 294, 300-301 (1964) ("nationwide scope" of the problem of racial discrimination supported Congress's conclusion that it substantially affected interstate commerce).

Nothing in *Lopez* calls into question the court of appeals' holding. The Court in *Lopez* struck down the provision of the Gun Free School Zones Act that made criminal the possession of a firearm in the vicinity of a school. The Court reasoned that the statute "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 115 S. Ct. at 1630-1631; *id.* at 1640 (Kennedy, J., joined by O'Connor, J., concurring). The Court concluded that the possession of an otherwise lawful firearm in a school zone bears such an attenuated relationship to interstate commerce that the Court would be required to "pile inference upon inference" to conclude that the regulated conduct affects commerce. *Id.* at 1632, 1634. The Court also noted the absence of evidence or congressional findings demonstrating that the regulated conduct substantially affects interstate commerce. *Id.* at 1631.

The Access Act differs markedly from the Gun Free School Zones Act. The Access Act "by its terms" directly addresses "commerce" and "economic enterprise[s]." *Lopez*, 115 S. Ct. at 1630-1631. It prohibits interference with commercial enterprises and with persons because they are engaging in commerce (*i.e.*, providing or obtaining the commercial service of reproductive health care). Unlike in *Lopez*, where neither the prohibited conduct (possession of a gun near schools) nor its immediate effect (increased potential for violence in schools) was commercial, here, the immediate effect of the prohibited conduct is

obstruction of commercial transactions. In addition, in contrast to *Lopez*, the effect of physical obstruction of reproductive health service facilities on interstate commerce is direct: it interferes with persons, things, and the provision of services in interstate commerce and threatens in the aggregate to eliminate abortion services from the national commerce. S. Rep. 3. Also, the Access Act, unlike the Gun Free School Zones Act as originally adopted, is supported by a legislative record containing abundant evidence and specific findings by Congress showing that the proscribed conduct substantially impedes interstate commerce—findings to which the courts must defer. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981).

Petitioner nonetheless contends (Pet. 19) that Congress lacked authority to enact the Access Act because the conduct prohibited by the statute is not itself commercial. She suggests that where the prohibited conduct is not a commercial transaction, a statute will be invalid unless it contains a jurisdictional element requiring proof that an individual defendant's conduct affected interstate commerce. The Court reaffirmed in *Lopez*, however, that Congress's commerce power extends to activities that *either* "arise out of *or* are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." 115 S. Ct. at 1631 (emphasis added). Indeed, nothing in that decision questions the power of Congress to prohibit the use, as distinguished from the mere possession, of firearms in certain situations. Here, the conduct proscribed by the Act is undoubtedly "connected with a commercial transaction" because it interferes with persons who are providing or obtaining a particular

commercial service (*i.e.*, reproductive health care). Thus, the Access Act is within the commerce power and need not require proof in every case that a particular defendant's conduct affected interstate commerce. See *id.* at 1631.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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